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No. OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1994

KIRK D. BILBY, CAPTAIN,
UNITED STATES AIR FORCE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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October 1994

34 pp

QUESTION PRESENTED

Whether the United States Court of Military Appeals' holding, that petitioner's conviction for conduct unbecoming an officer for soliciting an individual to violate 18 U.S.C. Section 2252 should be affirmed regardless of the constitutionality of 18 U.S.C. Section 2252, violates petitioner's rights under the Fifth Amendment of the United States' Constitution?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

The petitioner, Kirk D. Bilby, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in his case on 14 July 1994.

OPINIONS BELOW

The order and judgment of the United States Court of Military Appeals, *United States v. Bilby,* 39 M.J. 467 (C.M.A. 1994) is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, *United States v. Bilby,* 34 M.J. 1191 (A.F.C.M.R. 1992), *aff'd,* 39 M.J. 467 (C.M.A. 1994) is reprinted at Appendix B.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 14 July 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1259(3) (West 1993) and 10 U.S.C.A. Section 867a (West Supp. 1994).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment of the Constitution of the United States provides, in pertinent part, "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law".

STATEMENT OF THE CASE

At a general court-martial composed of a military judge sitting alone petitioner was convicted of conduct unbecoming an officer (in violation of U.C.M.J. Article 133, 10 U.S.C.A. Section 933 (West 1983)) by soliciting child pornography in violation of 18 U.S.C. Section 2252. (A second charge and specification alleging violation of U.C.M.J. Article 134, 10 U.S.C.A. Section 934 (West 1983), was dismissed by the court after acceptance of petitioner's guilty plea to the Article 133 offense. *See* DD Form 458 and R. 71.) Appellant was sentenced to be dismissed from the United States Air Force. R. 121. The convening authority approved the sentence as adjudged.

In 1989 the United States Customs Service began an undercover operation targeting child pornography. *See* Prosecution Exhibit 1. The Customs Service used a mailing list taken from the National Motion Picture Company in a separate action. *See id.* Individuals whose names appeared on the list were mailed a flyer along with National Motion Picture Company's catalog. *See id.* The flyer was

prepared by the Customs Service and advertised "extremely hard to obtain erotica". *See* Prosecution Exhibits 1 and 2. Anyone interested in the material was to contact "Artiste Internationale" at an address in Belgium. *See* Prosecution Exhibits 1 and 2. Petitioner's name appeared on the mailing list under an alias, Brian Dodd. *See* Prosecution Exhibit 1.

Petitioner contacted Artiste Internationale using his alias and requested their catalog. *See id.* Petitioner received the catalog and ordered two videotapes and two magazines on an order form provided in the catalog. *See* Prosecution Exhibits 1 and 5. The first videotape petitioner ordered was entitled "Little Ones in Love" and was described in the catalog as depicting sodomy and intercourse by a twelve year old boy and a ten year old girl. *See* Prosecution Exhibits 1, 4, and 5. The second videotape petitioner ordered was entitled "Carnivale" and was described as showing five, seven, and nine year old boys engaged in mutual masturbation, oral sodomy, and anal intercourse. *See* Prosecution Exhibits 1, 4, and 5. Petitioner accompanied the order form with a letter requesting a more complete listing of materials. *See* Prosecution Exhibits 1 and 6. In the letter requesting the catalog and the letter accompanying the order, petitioner requested that Artiste Internationale be "discreet". *See* Prosecution Exhibits 1 and 6.

In March 1990 petitioner wrote a letter to Artiste Internationale and a letter to National Motion Picture Company complaining that he had not received the materials he ordered. *See* Prosecution Exhibits 1, 8, and 9. A videotape containing both films was sent to petitioner's post office box on 25 June 1990 and petitioner picked up the material at the post office and took it home. *See* Prosecution

Exhibit 1. Petitioner's home was later searched pursuant to a search warrant, and the videotape and other material were discovered in the basement furnace room, hidden in the ceiling rafters behind the insulation of the heating system. *See id.*

At trial there was extensive discussion among the Military Judge, defense counsel, and trial counsel regarding whether the above-described offense stated an offense under the Uniform Code of Military Justice. *See* R. 23-40. During the inquiry into petitioner's plea of guilty, it became apparent that petitioner did not believe he was guilty of an offense. *See* R. 50-71. Petitioner stated he did not know it was a violation of law to solicit another person to send him the videotapes. *See* R. 56. After petitioner's guilty pleas were accepted by the Military Judge, petitioner made an unsworn statement during the presentencing procedure in which he again stated he did not knowingly break the law. *See* R. 104.

On appeal to the United States Air Force Court of Military Review petitioner claimed among other issues that the specification of the charge to which petitioner pleaded guilty failed to state an offense and that the specification of the charge to which the petitioner pleaded guilty was defective in not alleging every essential element of the offense. *See Assignment of Errors and Brief on Behalf of Accused* 1. With regard to the first issue, the United States Air Force Court of Military Review noted that the language of the specification followed the information accompanying U.C.M.J. Articles 133 and 134 (10 U.S.C.A. Sections 933 and 934 (West 1983)) set forth in the Manual for Courts-Martial; that the language satisfied the requirements of Rule for Court-Martial 307(c)(3) (a " 'plain, concise, and definite statement of the essential facts constituting the offense charged' "); and that the specification

was sufficient. *See United States v. Bilby,* 34 M.J. 1191, 1193 (A.F.C.M.R. 1992), *aff'd* 39 M.J. 467 (C.M.A. 1994). With regard to the second issue, the Court rejected petitioner's argument that an inherent scienter element was missing from the specification, holding that the United States need only prove that petitioner knew " 'the nature of the . . . visual depictions and that the depictions were to be transported or shipped in interstate or foreign commerce or mailed.' " *See id.* at 1193, quoting *United States v. Moncini,* 882 F.2d 401, 404 (9th Cir. 1989). The Court held that the Military Judge was not required to advise petitioner that he had to know the ages of persons depicted in the materials. *See Bilby,* 34 M.J. at 1194. The Court affirmed the findings of guilty and the sentence. *See id.* at 1195.

Petitioner appealed the decision of the United States Air Force Court of Military Review to the United States Court of Military Appeals. The United States Court of Military Appeals accepted for review the issue whether the statute under which petitioner was convicted was fatally defective and unconstitutional because it lacked a scienter requirement. *See Supplement to Petition for Grant of Review* 1 and *Order Granting Review.* The United States Court of Military Appeals noted controversy regarding the meaning of 18 U.S.C. Section 2252. *See United States v. Bilby,* 39 M.J. 467, 469 (C.M.A. 1994). The Court assumed, for purposes of its opinion, that petitioner was found guilty of conduct unbecoming an officer for soliciting another to violate the statute, as distinguished from the act of soliciting another to distribute child pornography. *See id.* at 469-470. The Court held that it was conduct unbecoming an officer for an officer to solicit another to violate a federal statute, regardless of the nature of the statute and the constitutionality of the statute. *See id.* at 470. The

Court thus affirmed the decision of the United States Air Force Court of Military Review. *Id.*

REASON FOR GRANTING THE WRIT

THIS COURT SHOULD REVIEW THE UNITED STATES COURT OF MILITARY APPEALS' DECISION IN THIS CASE, WHICH SUBJECTS UNITED STATES MILITARY OFFICERS TO CRIMINAL LIABILITY FOR SOLICITING OTHER INDIVIDUALS TO VIOLATE FEDERAL STATUTES, REGARDLESS OF THE CONSTITUTIONALITY OF THE FEDERAL STATUTES, IN LIGHT OF THIS COURT'S PENDING REVIEW OF *UNITED STATES V. X-CITEMENT VIDEO, INC.*, 982 F.2D 1285 (9TH CIR. 1992), *CERT. GRANTED,* 114 S.CT. 1186 (28 FEBRUARY 1994).

To constitute solicitation under military law, one must solicit or advise a person or persons to commit an *offense* under the Uniform Code of Military Justice. *See 10 U.S.C.A. Section 882* (West 1983) and *Manual for Courts-Martial, United States, 1984,* Part IV, paragraph 105. The essence of solicitation is the intention to engage in criminal conduct. *United States v. Gonzales,* 19 M.J. 951, 952 (A.F.C.M.R. 1985), *pet. denied,* 20 M.J. 206 (C.M.A. 1985). *See United States v. American Airlines,* 570 F.Supp. 654, 660-663 (N.D. Texas 1983), *rev'd on other grounds,* 743 F.2d 1114 (5th Cir. 1984). "An unconstitutional law is void, and is as no law. An offense created by it is not a crime." *Ex Parte Siebold,* 100 U.S. 371, 376 (1880). *See Ex Parte Royall,* 117 U.S. 241, 248 (1886). One may not be convicted for aiding and abetting someone to

do an innocent act. *See Shuttlesworth v. Birmingham,* 373 U.S. 262, 265-266 (1963). *See Standefer v. United States,* 447 U.S. 10, 21 n.14 (1980). If one may not be convicted of aiding and abetting someone to do an innocent act, it is logical that one may not be convicted of soliciting someone to do an innocent act. Therefore, if 18 U.S.C. Section 2252 is unconstitutional, petitioner committed no crime in soliciting another to violate it. In order to convict petitioner for conduct unbecoming an officer for the instant conduct, the United States Court of Military Appeals would have to have found 18 U.S.C. Section 2252 constitutional, address the underlying conduct, or both. The United States Court of Military Appeals declined to do either. *See United States v. Bilby,* 39 M.J. 467, 469-470 and 470 n.4 (C.M.A. 1994).

Presume that Congress passes and enacts a statute which states "All active duty Air Force officers shall shoot immediately all individuals wearing red bandannas whom they see." The day prior to the effective date of the statute Colonel X calls his subordinate officers Captain Y and Major Z into his office and tells them not to follow the statute as it is obviously illegal and unconstitutional. Under the Court of Military Appeals holding in the instant case, he would *per se* be involved in conduct unbecoming an officer and gentleman and would be subject to general court-martial and a maximum sentence including dismissal, forfeiture of all pay and allowances, and confinement for one year. *See 10 U.S.C.A. Section 933* (West 1983) and *Manual for Courts-Martial, United States, 1984,* Part IV, paragraph 59e (permissible punishment). Military officers swear or affirm to "support and defend the Constitution of the United States against all enemies, foreign and domestic". *See 5 U.S.C.A. Section 3331* (West 1977). Colonel X would arguably have a duty to counsel

his subordinates to refuse to follow this patently unconstitutional statute. In fact, he may be derelict in his duties (an offense punishable in his case by dismissal, forfeiture of all pay and allowances, and six months confinement) if he fails to counsel his subordinates. *See 10 U.S.C.A. Section 892* (West 1983) and *Manual for Courts-Martial United States, 1984,* Part IV, paragraph 16e(3)(B) (permissible punishment).

This Court has granted certiorari in *United States v. X-Citement Video, Inc.,* 982 F.2d 1285 (9th Cir. 1992), *cert. granted,* 114 S.Ct. 1186 (28 February 1994), and will address the constitutionality of 18 U.S.C. Section 2252. The case has been set for oral argument 5 October 1994. Petitioner concedes that if this Court determines that 18 U.S.C. Section 2252 is constitutional, his petition should be denied. However, if this Honorable Court determines that 18 U.S.C. Section 2252 is unconstitutional, petitioner would then have been convicted of soliciting another to violate an unconstitutional statute.

Such conviction would be fundamentally unfair and violate petitioner's rights under the Fifth Amendment of the United States Constitution. The United States Court of Military Appeals holding in this case threatens the fundamental rights of officers serving in all branches of the Armed Services. The Court of Military Appeals holding also threatens the fundamental rights of all military members, as the holding might be persuasively argued by analogy in U.C.M.J. Article 134 cases. (U.C.M.J. Article 134 prohibits disorders and neglects to the prejudice of good order and discipline in the armed forces and conduct of a nature to bring discredit upon the armed forces, *see 10 U.S.C.A. Section 934* (West 1983).)

CONCLUSION

The United States Court of Military Appeals' holding in the instant case, that petitioner may be convicted of conduct unbecoming an officer for soliciting another to violate a federal statute, regardless of the constitutionality of the statute, fundamentally violates petitioner's rights under the Fifth Amendment to the United States Constitution. The holding also directly threatens the fundamental rights of each officer serving in the Armed Forces of the United States and should be addressed by this Court.

Respectfully submitted,

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October 1994

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 93-0207
CMR No. 29250

UNITED STATES, APPELLEE

v.

KIRK D. BILBY, CAPTAIN U.S. AIR FORCE, APPELLANT

Argued Dec. 3, 1993
Decided July 14, 1994

Accused was convicted by general court-martial, Michael C. Callinan, J., pursuant to his guilty plea to a specification of conduct unbecoming an officer. The United States Air Force Court of Military Review affirmed, 34 M.J. 1191, affirmed. Review was granted. The United States Court of Military Appeals, Wiss, J., held that military officer's act of soliciting another person to violate a federal statute is conduct unbecoming an officer, regardless of the nature of the statute or lawfulness of the statute.

Affirmed.

For Appellant: *William G. Smith* (argued); *Colonel Jay L. Cohen* and *Captain Robert A. Parks.*

For Appellee: *Captain Jane M.E. Peterson* (argued); *Colonel Richard L. Purdon* and *Colonel Jeffery T. Infelise* (on brief); *Major Paul H. Blackwell, Jr.*

OPINION OF THE COURT

WISS, Judge.

Appellant pleaded guilty at a general court-martial to conduct unbecoming an officer by wrongfully and dishonorably soliciting distribution of child pornography in violation of 18 USC § 2252. *See* Art. 133, Uniform Code of Military Justice, 10 USC § 933. The military judge then sentenced him to dismissal from the service. The convening authority approved these results, and the Court of Military Review affirmed. 34 MJ 1191 (1992).

We granted appellant's petition that asked us to consider whether "the statute under which appellant was convicted (18 USC § 2252) [was] fatally defective and unconstitutional because it lacked a scienter requirement." Appellant urges that the statute is constitutionally flawed and that, as a result, he could not have been convicted lawfully of having solicited its violation. Now, on further consideration, we decide that we need not answer the granted issue in order to determine whether appellant's pleas and resulting conviction can stand: They can.

I

Appellant, under an alias, requested and received a catalog containing pornographic materials but never ordered anything. The United States Customs Service, as part of an undercover operation targeting child pornography, obtained the mailing list for the catalog, and they sent appellant and others a flyer advertising "extremely hard to obtain erotica."

The flyer did not mention child pornography, but appellant responded to the flyer by asking to purchase "very very young sex videos and magazines. . . ." He indicated that he was "looking for pre-teen, and young teen"

materials. Appellant was sent a catalog featuring pre-teen and young teen subjects, and he ordered two videos and two magazines. 34 MJ at 1192. The catalog's descriptions of the videos that he ordered made clear that they depicted explicit sexual activity by children of tender years—ages 5, 7, and 9 in one instance and ages 10 and 12 in the other.

Undercover officers placed the materials in appellant's post-office box. After appellant had retrieved them, taken them home, and left his house without them, agents obtained a search warrant for the house. They found the materials, the order form, and the catalog; and appellant subsequently was apprehended.

As referred to trial, the specification laid against appellant alleged that he

> wrongfully and dishonorably solicit[ed] the distribution of videotapes and/or magazines depicting child pornography involving children engaged in bondage, sadism, bestiality, and/or homosexual acts, and young male castration.

Appellant had negotiated a pretrial agreement to plead guilty to this specification and was fully prepared to do so at trial.

The military judge, however, engaged in a good deal of hand-wringing as to whether the specification was adequate to state an offense, absent adoption of the Federal child pornography law, 18 USC § 2252, to define "wrongfully." [1] With concomitant consternation on

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[1] In relevant part, 18 USC § 2252 provides:

(a) Any person who—

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails any visual depiction, if—

the part of the parties that the pretrial agreement was in jeopardy, they ultimately agreed to "clarif[y]" the specification by adding to the end of the original language: "the distribution of the said videotapes and/or magazines is a violation of 18 USC 2252." The parties agreed that, "[i]n essence, what we have then is the [Article] 134 [, UCMJ, 10 USC § 934] [offense of solicitation], charged as [Article] 133." *See generally* para. 59c(2), Part IV, Manual for Courts-Martial, United States, 1984 ("This article [133] includes acts made punishable by any other article, provided these acts amount to conduct unbecoming an officer and a gentleman.").

Appellant pleaded guilty to the specification as amended. During the providence inquiry, the military judge addressed the elements not only of conduct unbecoming an officer under Article 133 (*see* para. 59b), but also solicitation under Article 134 (*see* para. 105b, Part IV, Manual, *supra*) and of the crime allegedly solicited (*see* 18 USC §2252). In connection with the latter, the military judge defined "minor" ("any person under the age of 18"), "sexually explicit conduct" ("actual or simulated sexual intercourse . . ." and "includes bestiality, masturbation, sadistic or masochistic abuse or lascivious exhibition of the genitials or pubic area of any person"), and "visual depiction" ("even includes undeveloped film and videotapes").

(A) the producing of such vsiual depiction involves the use of a minor engaging in sexually explicit conduct; and
(B) such visual depiction is of such conduct;

* * *

shall be punished as provided in subsection (b) of this section.

II

In this Court, appellant attacks his pleas and conviction by asserting that 18 USC § 2252 lacks any scienter requirement and that, so lacking, it is an unconstitutional strict-liability infringement of protected free speech.[2] *See United States v. X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir.1992), *cert. granted*, ____ U.S. ____, 114 S.Ct. 1186, 127 L.Ed.2d 536 (February 28, 1994). He extrapolates that, since the specification to which he pleaded guilty and of which he was found guilty charged a violation of this unconstitutional statute, his pleas and conviction cannot be affirmed.[3]

The Government responds with a tripartite argument. First, the unbecoming conduct that was alleged and found was appellant's act of soliciting another to distribute child pornography—an act that independently satisfies the elements of Article 133 without reference to Article 134 and/or 18 USC § 2252. Second, that being so, the

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[2] The fact that appellant clearly knew that the materials he had ordered contained minor actresses and actors does not preclude his constitutional challenge that is based on absence of a scienter element. First Amendment overbreadth is one of the few exceptions to the principle that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court." *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 3359, 73 L.Ed.2d 1113 (1982); *accord Gooding v. Wilson*, 405 U.S. 518, 92 S.Ct. 1103, 31 L.Ed.2d 408 (1972).

[3] Appellant also asserts that the unconstitutionality of the statute poisons the search warrant that led to discovery of the evidence against him which, in turn, prompted his pleas and resultant conviction. Apart from the tortuousness of this reasoning, it ignores the clear principle that an unconditional plea of guilty waives any appellate complaint of unlawful search and seizure. *See* Mil.R.Evid. 311(i), Manual for Courts-Martial, United States, 1984; *cf.* RCM 910(a)(2), Manual, *supra*.

amendment of the specification to include reference to 18 USC §2252 and the providence inquiry into the elements of that statute merely were surplusage. Finally, 18 USC § 2252 contains a scienter element in any event, and appellant admitted during the providence inquiry that he had it.

We are aware that there is considerable controversy surrounding the meaning of 18 USC §2252, the Protection of Children Against Sexual Exploitation Act of 1977. *See, e.g., United States v. Knox,* 977 F.2d 815 (3d Cir.1992), *cert. granted, ____ U.S. ____, 113 S.Ct. 2926, 124 L.Ed.2d 677 (1993), vacated and remanded,* ____ U.S. ____, 114 S.Ct. 375, 126 L.Ed.2d 325 (1993) (what constitutes "lascivious" and "exhibition" for purposes of the statute's prohibition of "lascivious exhibition of the genitals or pubic area"—18 USC § 2256(2)(E)). Concerning the precise issue in the case at bar, appellant is correct that a majority of a panel of the Ninth Circuit in *X-Citement Video* did hold that the statute does not contain a scienter requirement and that, as such, it unconstitutionally chills free speech. ***But see United States v. Moncini,*** 882 F.2d 401 (9th Cir. 1989) (dictum). A dissenting judge in *X-citement Video* (9th Cir.) agreed that the statute does not expressly include scienter but concluded that the statute could and should be constitutionally narrowed to include a scienter of recklessness, which he believed would meet the First Amendment challenge. *See generally Osborne v. Ohio,* 495 U.S. 103, 115, 110 S.Ct. 1691, 1699, 109 L.Ed.2d (1990) (recklessness "plainly satisfies the requirement laid down in [*New York v.*] *Ferber*[, 458 U.S. 747, 765[, 102 S.Ct. 3348, 3358, 73 L.Ed.2d 1113] (1982)] that prohibitions on child pornography include some element of scienter").

The Ninth Circuit is the only federal Court of Appeals to have forthrightfully ruled on this issue. In the process of resolving related issues, however, several other circuits have concluded or assumed that the statute requires knowledge that the materials contain minors. *See, e.g., Rodriguez v. Clark Color Laboratories,* 921 F.2d 347 (1st Cir.1990); *United States v. Duncan,* 896 F.2d 271 (7th Cir.1990); *United States v. Brown,* 862 F.2d 1033 (3d Cir.1988); *United States v. Garot,* 801 F.2d 1241 (10th Cir.1986). Also, several district courts have rejected the Ninth Circuit's reasoning and have held that knowledge that the materials contained minors is required by the statute. *See, e.g., United States v. Kempton,* 826 F.Supp. 386 (D.Kan. 1993); *United States v. Prytz,* 822 F.Supp. 331 (D.S.C.1993). Other district courts, however, have concluded to the contrary. *See, e.g., United States v. Kleiner,* 663 F.Supp. 43 (S.D.Fla.1987); *United States v. Tolczeki,* 614 F.Supp. 1424 (N.D. Ohio 1985). The Supreme Court only recently has granted certiorari in *X-Citement Video,* but we do not need to be detained by this provocative debate.

We will assume for our present purposes that appellant is correct that he was found guilty of conduct unbecoming an officer by soliciting another to violate 18 USC § 2252, as opposed to the Government's position that he was found guilty of conduct unbecoming an officer by arguably the more generic act of soliciting another to distribute child pornography. Indeed, that was the expressed views of the parties and the military judge when the specification was amended, when the parties discussed the maximum imposable sentence, and when the military judge inquired into the providence of the plea.[4]

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[4] It might well be that, under the facts of this case, appellant could have been prosecuted for the conduct unbecoming an officer by

We do not believe that it seriously can be doubted that a military officer's act of soliciting another person to violate a Federal statute is disgraceful and dishonorable conduct, *see Parker v. Levy,* 417 U.S. 733, 761, 94 S.Ct. 2547, 2564, 41 L.Ed.2d 439 (1974), without regard for the nature of the statute (that is, what is prohibits) or for the lawfulness of the statute (that is, whether it ultimately is upheld as constitutional). It is not necessary, under Article 133, that the conduct of the officer, itself, otherwise be a crime. *United States v. Taylor,* 23 MJ 314, 318 (CMA 1987) (Court affirmed conviction for violating Article 133 by requesting another person to commit an offense under circumstances when that act was not punishable solicitation under Article 134); *see* para. 59c(2). *Cf. United States v. Choate,* 32 MJ 423, 425 (CMA 1991). Simply stated, it is unbecoming for an officer to solicit someone to violate a Federal statute—period.

Therefore, we need not enter the quagmire of the debate over whether 18 USC § 2252 is constitutional and, if not, whether one can be guilty under *Article 134* of soliciting another to violate it. Instead, *under Article 133,* all that is necessary is that appellant did some certain act and that, under the circumstances, that act constituted conduct unbecoming an officer. *See* para. 59b. Here, that act

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his involvement with child pornography. Likely, few would disagree that any reasonable officer would know of the criminality of such conduct. *Cf. United States v. Hartwig,* 39 MJ 125 (CMA 1994) (conduct unbecoming an officer to solicit a schoolgirl to mail a nude photograph of herself to him). As we have pointed out in this opinion, however, that was not ultimately the basis of appellant's pleas, the providence inquiry, or the military judge's findings of guilty; so we will restrict our discussion accordingly.

was soliciting someone else to violate a federal statute, *see Parker v. Levy, supra.*

III

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge SULLIVAN and Judges COX, CRAWFORD, and GIERKE concur.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 29250

UNITED STATES

v.

CAPTAIN KIRK D. BILBY, 385-68-2751, UNITED STATES AIR FORCE

Sentenced Adjudged 1 Feb. 1991
Decided 9 June 1992

Accused was convicted by general court-martial, Andrews Air Force Base, Maryland, Michael C. Callinan, J., pursuant to his guilty plea to a specification of conduct unbecoming an officer. The United States Air Force Court of Military Review, O'Hair, Senior Judge, held that: (1) the specification that charged the accused with conduct unbecoming an officer by soliciting the distribution of child pornography was sufficient to state an offense; (2) it was not necessary to advise the accused of any scienter element; (3) an entrapment defense was not available to the accused, who had been targeted in an undercover investigation and sent an advertisement for erotic materials, where the accused raised the possibility of purchasing child pornography, thus indicating his predisposition; and (4) the accused failed to rebut the presumption that he received effective assistance of counsel.

Affirmed.

Appellate Counsel for the Appellant: William G. Smith (argued), Colonel Jeffrey R. Owens, Major Alice M. Kottmyer, Major Mary V. Yastishock, and Major Ronald G. Morgan.

Appellate Counsel for the United States: Major Paul H. Blackwell, Jr. (argued) and Lieutenant Colonel Brenda J. Hollis.

Before O'HAIR, RIVES, and MILLS, Appellate Military Judges.

OPINION OF THE COURT

O'HAIR, Senior Judge:

Pursuant to a pretrial agreement, appellant pleaded guilty to one specification of conduct unbecoming an officer which alleged he did:

> [W]rongfully and dishonorably solicit the distribution of videotapes and/or magazines depicting child pornography involving children engaged in bondage, sadism, bestiality, and/or homosexual acts, and young male castration, the distribution of the said videotapes and/or magazines is a violation of 18 U.S.C. 2252,

in violation of Article 133, UCMJ, 10 U.S.C. § 933. The military judge sitting as a general court-martial sentenced him to be dismissed from the service.

The appellant submitted four assignments of error for our consideration:

> 1. The specification of the Charge to which the Appellant entered a plea of guilty failed to state an offense;
>
> 2. The specification of the Charge to which the Appellant entered a plea of guilty was fatally defective in not alleging every essential element of the offense charged;

3. Appellant's plea of guilty to the specification of Charge I was improvident;
4. Appellant was denied his Sixth Amendment right to effective assistance of counsel.

However, during an oral argument, the primary focus was on the issue of whether appellant was entrapped by federal authorities. Examining all four assignments of error, we find none with merit and affirm.

Sometime before the charged misconduct the appellant, using an assumed name, requested he be sent a catalog containing pornographic materials which presumably could be legally purchased through the mail. He received the catalog at his private post office box and there was no evidence he ever ordered anything from this catalog. In late 1989, the United States Customs Service, as part of an undercover operation targeting child pornography, obtained the mailing list for the above catalog. Those persons whose names were on the mailing list, including the appellant under his assumed name, were sent a flyer which advertised "extremely hard to obtain erotica", but it did not mention child pornography or other specifics. Using his assumed name, appellant responded to this letter by requesting to purchase "very very young sex videos and magazines. . . ." He indicated he was "looking for pre-teen, and young teen" materials. As a result of this letter appellant was sent a catalog of videos and magazines featuring pre-teen and young teen subjects and the catalog listed the ages of the children who appeared in these productions. Appellant completed an order blank, selected two videos and two magazines he wished to purchase and forwarded $128 in cash to pay for his order. When, after 8 weeks, he had not received his materials, he sent a letter of complaint to the supposed supplier. After 2 more weeks

of waiting and no receipt, he sent another letter of complaint. Finally, on 25 June 1990, undercover officers arranged for the two videos appellant ordered to be placed in his post office box. While under surveillance, appellant retrieved the videos from his post office box and took them home. A search of his home was conducted pursuant to a search warrant and the videos were discovered in the basement furnace room behind some ceiling insulation.

After the arraignment, but prior to conducting a *Care* inquiry into the providence of his guilty plea, the military judge questioned counsel for both sides as to what each believed the elements of the offense to be. He also solicited their opinion as to the maximum allowable punishment. Following much discussion and many recesses, both parties orally stipulated to amend the specification. They agreed that this was done solely for the purpose of clarifying it, without changing its nature or scope. The added language, which is quoted above, is as follows: "the distribution of said videotapes and/or magazines is a violation of 18 U.S.C. 2252." The military judge permitted the amendment of the specification; however, he stated he did not see the necessity of reflecting this change on the charge sheet.*

I

Appellant's attack on the overall form and content of the specification is meritless. The language used in the specification, as it was amended at trial with the consent of all parties, complies with the guidance found in the

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* The better practice would be to make this amendment on the charge sheet, rather than leaving it to the staff of the convening authority to discover such changes and properly reflect them on a promulgating order.

explanations and sample specifications of Article 133, and the Article 134, 10 U.S.C. § 934 offense after which the specification was fashioned. MCM, Part IV, paragraphs 59c and f, 105b and f.

The military judge informed the appellant that the following elements constituted the offense of conduct unbecoming an officer by soliciting the transporting of child pornography:

> 1. [A]t or near Waldorf, Maryland, you wrongfully and dishonorably solicited the distribution of child pornography, specifically involving children . . . engaged in bondage, sadism, bestiality, homosexual acts, and young male castration.
>
> 2. [Y]our conduct amounted to solicitation to the Artiste Internationale that they transport or ship visual depictions of minors engaged in sexually explicit conduct . . . which would be a violation of the Federal statute, 18 U.S.C. 2252. In other words, you actually intdended that they violate that statute.
>
> 3. [Y]ou intended that Artiste Internationale transport visual depictions of minors engaged in sexually explicit conduct in violation of 18 U.S.C. 2252.
>
> 4. [T]hat under the circumstances, your conduct was conduct unbecoming an officer and a gentleman.

The military judge then recited the elements of the offense solicited by appellant, sending child pornography through the mails:

> 1. Artiste Internationale would have had to first, knowingly transport or ship in interstate or foreign commerce a visual depiction.
>
> 2. That visual depiction must be produced using minors engaged in sexually explicit conduct . . .

3. [T]he visual depiction would show the minors engaged in sexually explicit conduct.

We find that the specifications, as amended by the parties, satisfies the requirements of Rule for Court-Martial (RCM) 307(c)(3) that the language amount to a "plain, concise, and definite statement of the essential facts constituting the offense charged." The elements, as stipulated to by the parties and later explained by the military judge, were a complete description of the facts the government would have had to prove had this been a contested case.

II

The appellant raises for the first time on appeal that the advice to appellant was deficient in that there is an inherent "scienter" element missing from this recitation by the military judge. If the appellant's argument were accepted, this would require that the government prove appellant had actual knowledge of the ages of the minors appearing in the solicited child pornography. We reject this proposition. The government need only prove that an accused had "knowledge of the nature of the contents of the visual depictions and that the depictions were to be transported or shipped in interstate or foreign commerce or mailed." *United States v. Moncini,* 882 F.2d 401, 404 (9th Cir.1989). "[I]t is only the shipment or transportation of the sexually explicit material which must be knowing." *United States v. Kleiner,* 663 F.Supp. 43, 44 (S.D.Fla.1987). Since the prosecution of a person who *produces* child-pornographic materials (under 18 U.S.C. § 2251(a)) does not require proof that the defendant has knowledge of the minor's age, it makes sense that the prosecution of one who *transports* these same materials through the mails can be done without having to prove

knowledge of the minor's age. *See United States v. U.S. District Court for the Central District of California,* 858 F.2d 534, 538 (9th Cir. 1988). Therefore, we conclude that the military judge was not required to advise appellant that he had to know the ages of persons depicted in the pornographic materials he ordered.

III

The more difficult issue before us is whether appellant's plea was provident.The appellant insisted at trial that at the time of the alleged acts he did not know that mailing child pornography, and that soliciting another to perform such an act, were illegal. This prompted the judge to explain that ignorance of the law is not a defense, and to secure appellant's understanding of this principle.

The trial judge was extraordinarily patient and thorough in all aspects of the providence inquiry, generously allowing time for appellant to consult with counsel at times when he showed any hesitation to admit his culpability. This same manner continued during his exchange with the appellant when discussing the defense of entrapment. Once again, appellant was reticent when he responded to the judge's question of whether he understood that the defense of entrapment was not applicable to him under the facts of this case. Appellant's initial response was simply: "I've been told that it doesn't." This prompted a further exploration of this topic which ultimately resulted in appellant's acceptance of this legal conclusion.

After the original briefs were submitted in this case, the U.S. Supreme Court announced a decision in the case of *Jacobson v. United States,* ____ U.S. ____, 112 S.Ct. 1535, 118 L.Ed.2d 147 (1992). Jacobson was the subject

of a series of communications from federal undercover agents for 26 months. At the conclusion of that period he finally requested that several items of child pornography be sent to him. In finding an entrapment defense existed and reversing his conviction, Justice White wrote for the majority:

> "Had the agents in this case simply offered petitioner the opportunity to order child pornography through the mails, and petitioner—who must be presumed to know the law—had promptly availed himself of this criminal opportunity, it is unlikely that his entrapment defense would have warranted a jury instruction."

Jacobson, ____ U.S. at ____, 112 S.Ct. at 1541. This hypothetical description is exactly what we have here. Undercover agents found appellant's assumed name on a mailing list for a catalog of pornographic materials. They sent appellant a flyer in which there was no mention of child pornography, and it was appellant who first raised this topic and indicated his willingness to buy these items. They sent him a catalog of videos and magazines they had for sale, which included a listing of the ages of the children purportedly photographed in their merchandise. Appellant ordered four itmes with the intent they be mailed to him at his at his post office box.

From these facts, we agree the defense of entrapment was not available to appellant. The appellant was predisposed to commit this crime and the undercover agents provided no more than an opportunity. *United States v. Whittle,* 34 M.J. 206 (C.M.A.1992); *United States v. Clark,* 28 M.J. 401 (C.M.A.1989); RCM 916(g). Our reading of the Stipulation of Fact, appellant's testimony and the other prosecution exhibits considered

by the military judge persuade us the plea was provident. We are convinced appellant anticipated the persons appearing in the magazines and videotapes he ordered would be minors. We derive this not only from his initial correspondence which described his preference for "pre-teen and young teen" materials but also because the ages of the young actors were contained in those materials. Accordingly, the military judge appropriately informed and questiones appellant on the elements of the offense to which he desired to plead guilty, discussed potential defenses with him and properly accepted the plea. The providence inquiry was complete in all respects.

IV

In the final assignment of error, appellant complains that his trial defense counsel were ineffective. On this assignment, the Court has considered the affidavit submitted by one of the trial defense counsel. We find the defense of appellant at trial was effective and conscientious.

The law presumes that counsel are effective and they act in the best interest of their client. To rebut this presumption appellant must show that the alleged errors of counsel were so serious that there is a reasonable probability that the outcome would have been different had they not occurred. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cordes,* 33 M.J. 462 (C.M.A.1991); *United States v. Bono,* 26 M.J. 240 (C.M.A.1988). Our examination of the defense counsel's affidavit provides a professionally sound explanation for the tactics followed by the defense at trial. Consequently, we find appellant's assertion of ineffective assistance of counsel to be without merit.

For the reasons stated, the findings of guilty and the sentence are

AFFIRMED.

Judges RIVES and MILLS concur.

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No. 94-584

In the Supreme Court of the United States

OCTOBER TERM, 1994

KIRK D. BILBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was properly convicted of conduct unbecoming an officer in violation of Article 133 of the Uniform Code of Military Justice, 10 U.S.C. 933.

In the Supreme Court of the United States

OCTOBER TERM, 1994

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (now called the United States Court of Appeals for the Armed Forces) (Pet. App. 1a-9a) is reported at 39 M.J. 467. The opinion of the United States Air Force Court of Military Review (Pet. App. 10a-19a) is reported at 34 M.J. 1191.

JURISDICTION

The judgment of the Court of Military Appeals was entered on July 14, 1994. The petition for a writ of certiorari was filed on September 30, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1993).

STATEMENT

Petitioner pleaded guilty at a general court-martial to conduct unbecoming an officer. See Article 133, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 933. The military judge sentenced him to dismissal from the service. The convening authority approved the findings and sentence. The Air Force Court of Military Review and the Court of Military Appeals affirmed. Pet. App. 1a-9a, 10a-19a.

1. Under an alias, petitioner requested and received a catalogue containing pornographic materials. As part of an undercover operation targeting child pornography, the United States Customs Service obtained the mailing list for the catalogue and sent petitioner a flyer advertising "extremely hard to obtain erotica." Pet. App. 2a. Although the flyer did not mention child pornography, petitioner responded by asking to purchase "very very young sex videos and magazines." *Ibid.* Petitioner was sent a catalogue featuring pre-teen and young teen subjects, and he ordered two videotapes and two magazines. The catalogue's descriptions of the videotapes made clear that they depicted children between the ages of 5 and 12 engaged in explicit sexual activity. After petitioner received the materials, his residence was searched pursuant to a warrant, and petitioner was apprehended. *Id.* at 3a.

2. Petitioner was charged with a violation of Article 133 of the UCMJ, which provides that "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct." 10 U.S.C. 933. As referred to trial, the specification alleged that petitioner had "wrongfully and dishonorably solicit[ed] the distribution of videotapes and/or magazines depicting

child pornography involving children engaged in bondage, sadism, bestiality, and/or homosexual acts, and young male castration." Pet. App. 3a. Petitioner negotiated a pretrial agreement to plead guilty to that specification. *Ibid.*

At the plea hearing the military judge expressed skepticism that the specification was sufficient to state an offense absent express reference to federal legislation prohibiting the distribution of child pornography. See II R. 34 ("In the absence of a Federal statute, what makes it wrongful to distribute child pornography?"); Pet. App. 3a. The parties subsequently agreed to amend the specification to include the statement that "the distribution of the said videotapes and/or magazines is a violation of 18 USC 2252." II R. 38; Pet. App. 4a, 11a. Petitioner pleaded guilty to the amended specification. Pet. App. 4a. Petitioner was sentenced to dismissal from the service, and the convening authority approved the findings and sentence. *Id.* at 2a. Petitioner appealed, contending, *inter alia*, that the specification as amended failed to state an offense and failed to allege all elements of the offense charged. *Id.* at 11a. The Air Force Court of Military Review affirmed. *Id.* at 10a-19a.

3. Petitioner then sought review in the Court of Military Appeals. Relying on *United States* v. *X-Citement Video, Inc.*, 982 F.2d 1285 (9th Cir. 1992), reversed, No. 93-723 (Nov. 29, 1994), he contended that 18 U.S.C. 2252 (1988 & Supp. V 1993) is unconstitutional because it lacks any scienter requirement with respect to the minority of the performers depicted. Petitioner further contended that the unconstitutionality of the underlying statute rendered his plea and conviction invalid. Pet. App. 5a.

The Court of Military Appeals stated that it "need not enter the quagmire of the debate over whether 18 U.S.C.

§ 2252 is constitutional." Pet. App. 8a. Under Article 133, the court noted, "all that is necessary is that [petitioner] did some certain act and that, under the circumstances, that act constituted conduct unbecoming an officer." Pet. App. 8a. The court concluded that

> [w]e do not believe that it seriously can be doubted that a military officer's act of soliciting another person to violate a Federal statute is disgraceful and dishonorable conduct, without regard for the nature of the statute (that is, what i[t] prohibits) or for the lawfulness of the statute (that is, whether it ultimately is upheld as constitutional). * * * Simply stated, it is unbecoming for an officer to solicit someone to violate a Federal statute—period.

Ibid. (citation omitted).

ARGUMENT

Petitioner challenges the Court of Military Appeals' holding that solicitation to violate even an unconstitutional federal statute is "conduct unbecoming an officer" within the meaning of Article 133. That question is not properly presented in this case. The federal statute at issue here is 18 U.S.C. 2252 (1988 & Supp. V 1993). On November 29, 1994, this Court issued its opinion in *United States* v. *X-Citement Video, Inc.*, No. 93-723, holding that Section 2252 requires knowledge of the minority of the performers depicted engaging in sexually explicit conduct and that the statute, so construed, is constitutional. In light of that holding, petitioner plainly has no tenable basis for challenging the specification to which he pleaded guilty. Indeed, petitioner has conceded (Pet. 8) that if *X-Citement Video* is decided in the government's favor, his petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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